91-681

(1)

Supreme Court, U.S.
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No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1991

California Sand and Gravel, Inc.,
Petitioner

v.

The United States,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

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September 24, 1991

QUESTIONS PRESENTED FOR REVIEW

1. In interpreting the petitioner's contract with the government without any regard to well established principles of contract interpretation, did the United States Court of Appeals for the Federal Circuit so abuse its discretion as to call for an exercise of this Court's supervision?

2. In finding that "cause" existed for termination of the contract even though this was not an issue presented or argued before the court, did the Court of Appeals so far overstep the rules and boundaries of the matters to be considered on motions for summary judgment as to have impermissibly departed from the accepted and usual course of judicial proceedings?

3. In determining that the acts and omissions of third parties over which petitioner had no control constituted cause for termination of petitioner's contract, did the United States Court of Appeals so far depart from general principles of law as to call for an exercise of

this Court's power of supervision?

4. The Court of Appeals refrained form any comment or decision on Petitioner's argument that the pending bankruptcy made ineffective any purported termination. Did the Court thereby abuse its discretion by avoiding that aspect of Petitioner's appeal which would be dispositive of the appeal regardless of the Court's decision on the remaining issues?

Rule 14.1(b) Listing

The parties to the proceedings below were the petitioner, California Sand and Gravel, Inc. and the respondent The United States.

Hansen Basin Sand and Gravel, Inc., Illinois-California Sand and Gravel, Inc. and Recon Investments, Inc. were plaintiffs in the original complaint but these entities elected not to pursue an appeal.

Rule 29.1 Listing

The parent company of California Sand and Gravel, Inc. is Illinois-California Sand and Gravel, Inc. California Sand and Gravel, Inc.'s affiliates and subsidiaries are Hansen Basin Sand and Gravel, Inc. and Recon Investments, Inc.

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The petitioner California Sand and Gravel, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit, entered in the above-entitled proceeding on June 27, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit is unpublished, but is reprinted in the appendix hereto, p. 2a infra.

The Order of the United States Claims Court is reported at 22 Cl.Ct 19 (1990) and is reprinted in the appendix hereto, p. 6a infra.

JURISDICTION

Invoking federal jurisdiction under 41 U.S.C. §609 (a)(1) and 28 U.S.C. §1491, the petitioner brought this suit in the United States Claims Court. On November 14, 1990, the Claims Court granted the respondents' motion for summary judgment and motion to dismiss for lack of jurisdiction against plaintiffs Illinois-California Sand and Gravel, Inc., Recon

Investments, Inc., and Hansen-Basin Sand and Gravel, Inc.

On petitioner's appeal, the Federal Circuit on June 27, 1991 entered an judgment and an opinion affirming the Claims Court's orders and dismissing petitioner's complaint. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Federal Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

A. 28 U.S.C. §1295 Jurisdiction of the United States Court of Appeals for the Federal Circuit.

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction --

(3) of an appeal from a final decision of the United States Claims Court.

B. 28 U.S.C. §1254. Courts of Appeal; Certiorari; Appeal; Certified Questions.

Cases in the Courts of Appeal may be received by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

STATEMENT OF THE CASE

A. Procedural Background

This dispute arose out of the United

States' termination of a written License Agreement granting Petitioner CALIFORNIA SAND AND GRAVEL, INC. ("CAL SAND"), access to Hansen Dam in Los Angeles, California, for purposes of excavation. On May 15, 1989, CAL SAND filed a complaint in the United States Claims Court claiming damages for breach of the License Agreement, wrongful termination, and breach of the implied covenant of good faith and fair dealing, based upon the activities of the United States Army Corps of Engineers, Los Angeles District ("Corps").

The jurisdiction of the Claims Court was invoked under 28 U.S.C. §1491 which gives the Claims Court jurisdiction to render judgment under any express or implied contract with the United States and under 41 U.S.C. §609(a)(1) which permits a contractor to bring an action in the United States Claims Court.

On November 17, 1989, the United States filed a motion to dismiss the complaint and, in the alternative, for summary judgment asserting

that there was no genuine issue of material fact and that the United States was entitled to judgment as a matter of law. By Order filed November 14, 1990, The Honorable Moody R. Tidwell granted the United States' motion to dismiss for lack of jurisdiction as to plaintiffs ILLINOIS-CALIFORNIA SAND AND GRAVEL, INC., RECON INVESTMENTS, INC., and HANSEN-BASIN SAND AND GRAVEL, INC., and granted the United States' motion for summary judgment as against plaintiff CAL SAND, thereby disposing of the entire action. (App. 2-17) CAL SAND appealed to the U.S. Court of Appeals for the Federal Circuit from the portion of the Order granting the motion for summary judgment and the Judgment entered pursuant thereto.[1] By opinion dated June 27, 1991 the Court of Appeals for the Federal Circuit affirmed the judgment of the Claims Court.

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[1] The other parties which were originally designated as plaintiffs with respect to the motion to dismiss elected not to pursue the appeal.

B. **Factual Background.**

In 1941, the Corps designed and constructed Hansen Dam to control Los Angeles Basin flood waters. The portion of the pool storage capacity initially allocated for sediment deposits subsequently proved insufficient because of heavy rains. Excavating the dam was expensive and budgetary constraints led to an innovative program under which the Corps granted five licenses to private enterprises for the excavation and sale of sand and gravel. Each licensee was assigned a specific designated excavation area, as well as an area in which to set up a processing plant.

On March 26, 1982, The Corps entered into a written excavation License Agreement with CAL SAND. (App. 230-236.) CAL SAND was assured that if it came into the dam and commenced the required operations, it would be able to remain in the dam as long as there would be sediment available for removal. In order to commence a proper sediment removal operation, a tremendous

amount of capital investment was necessary. (App. 343.) Millions of dollars were invested in the project in Hansen Dam. (App. 352-353).

The License Agreement was prepared by the Corps on a standard government form which included a pre-printed clause stating that the license was "revocable at the will of the Secretary of the Army." (App. 230.) The specific terms of CAL SAND's license, which were typed onto the form agreement, provided that the license would last for a period of one (1) year and would thereafter be renewable on a year-to-year basis for an additional four (4) year period. (App. 230.) Two other specifically tailored provisions of the License Agreement, Conditions 12 and 30, specified that:

> 12. The license is issued for a period of one year and renewable on a year-to-year basis during the next four year [sic], subject to satisfactory performance by licensee. (App. 231.)
> 30. Unless otherwise specified herein, the license may be revoked or canceled at any time by the said officer when required for flood

> control purposes. The Corps of Engineers shall reserve the right to revoke th_s [sic] license on 30 days notice. (App. 232.)

Shortly after the signature of the License Agreement, Mr. John H. King, an individual contemplating the purchase of CAL SAND, approached certain officers in the Corps, explained that he was considering the purchase of CAL SAND, and inquired about the operation and effect of certain provisions in the License Agreement. (App. 351.) Mr. King was advised that Condition 30 of the License Agreement would only enable to Corps to cancel CAL SAND's license in the case of flood or disaster. (App. 352.) Similarly, Mr. King was advised that the printed portion of the form which stated that the license was "revocable at the will of the Secretary of the Army" would only authorize the government to terminate the license in the case of war or natural disaster. (App. 352.) Mr. King was also assured that yearly reapplication for the license would not be necessary, and that

it would be renewed automatically so long as CAL SAND's work was satisfactory. (App. 353.) Those representations were consistent with the established government policy that a License Agreement could only be revoked with reasonable cause. (App. 142.)

In late 1983, the Corps informed Mr. King, who had since purchased CAL SAND, that it was changing its mode of operation at Hansen Dam and intended to select one single licensee to operate the entire basin. (App. 353.) Mr. King was advised by the District Chief of Operations, Mr. Land, that the new licensee would, in all likelihood, be Channel and Basin Reclamation Inc. ("Channel"). (App. 354.) The official explanation given for this change was that the four original licensees had not removed enough sediment and silt. In reality, however, it appears that the government had experienced so many problems with one of the licensees, Paul Hurns, that it had decided to terminate all four (4) of the existing licenses in order to rid

itself of Hurns. In that regard, Mr. Land told Mr. King that, if CAL SAND relinquished its claims under the Hansen Dam License Agreement, CAL SAND would be granted a new license to excavate material at Santa Fe Dam. (App. 354-355.) Mr. King spoke to both the District Engineer, Colonel Taylor, and the District Chief of Real Estate, Mr. Cheadle, about the potential relocation; both of them assured Mr. King that whatever he worked out with Mr. Land would be fine with them. (App. 354.)

On April 9, 1984, the Corps executed an exclusive five-year license with Channel to operate at Hansen Dam. (App. 297-299) The following day, April 10, 1984, the government gave written notice to CAL SAND of its decision to terminate CAL SAND's license pursuant to paragraph two of "Amendment 5" to the License Agreement. (App. 311.) CAL SAND had never executed, and had never been presented with, an "Amendment 5". (App. 354-356.) Subsequently, it was learned that the government had prepared

Amendment 5 for the purpose of converting CAL SAND's license to a month-to-month agreement which would be terminable at any time, with or without cause, on thirty (30) days' notice. Erroneously believing that the terms of the License Agreement had been so modified, the government made the internal determination that it had the right to terminate CAL SAND's license simply by giving notice and without any showing of cause. (App. 288.) In reality, the original terms of the License Agreement had never been modified and were still controlling.

During continuing discussions with Mr. Land regarding the procedure for formalizing the license for Santa Fe Dam, Mr. Land instructed Mr. King to send him two letters; the first was to confirm that CAL SAND would vacate the Hansen Dam premises; the second was to request the formal issuance of the license for Santa Fe Dam. (App. 355.) Mr. King sent those letters on May 9, 1984, in reliance upon Mr. Land's representation that CAL SAND would be granted a

license for excavation at Santa Fe Dam. (App. 314, 315.) In further reliance upon Mr. Land's representation that CAL SAND would be granted a new license for Santa Fe Dam, Mr. King caused CAL SAND to cease its operations at Hansen Dam. In late June 1984, however, Mr. King was advised that CAL SAND would not be granted a license for Santa Fe Dam. (App. 331.)

C. **The Claims Court's Decision.**

The Claims Court concluded that the License Agreement was a fully integrated agreement and that the parol evidence rule precluded the introduction of any evidence of prior or contemporaneous agreements to vary the terms of the agreement. The Claims Court recognized, however, that the parol evidence rule does not preclude consideration of subsequent agreements to modify the terms of the original agreement. In that context, the court considered the potential enforceability of the subsequent agreement for relocation of CAL SAND's operations to Santa Fe Dam. The court

concluded, however, that Mr. Land did not have the actual authority necessary to contractually bind the government, and rejected CAL SAND's argument that the agreement was ratified by two government representatives who did not possess the requisite authority.

With respect to the government's right to terminate the license, the court found that the statements made by government officials concerning the meaning of the termination provisions were irrelevant without a showing that the government representatives involved had actual authority to contractually bind the government. The court also found, as a matter of law, that the second sentence of Condition 30 gave the government the right to terminate the license at any time on 30 days' notice, regardless of whether such termination was required for flood control purposes.

The court went on to rule that the written notice of termination was effective, even though erroneously premised on Amendment 5. Although

the court did apparently recognize that the government had to have "reasonable cause" to revoke the license, the court went on to conclude that:

> Here, the cause was reasonable; plaintiff and other licensees failed to perform adequately. On that, the record is clear. Had the licensees removed the sediment sufficiently so as not to not [sic] create a flood hazard the government, in all likelihood, would have permitted each, including California Sand & Gravel, Inc., to complete its five-year term.

D. **Opinion of the U.S. Court of Appeals.**

The Court of Appeals concluded that on its face, Condition 30 permits cancellation of the license on 30 days notice and that even if a flood control purpose was a necessary prerequisite to termination this was supplied by Colonel Taylor's oblique statement,

> "While relatively small amounts of sand and gravel were being removed by three of these licensees, the silt remained . . . [and] I, as the District Engineer, determined that it would be in the public interest to again solicit proposals from the industry to remove silt as well as sand and gravel from the Hansen Dam Flood Control Basin. A large

> operation was contemplated which would also more quickly help restore the flood control capacity of the basin."

The Appeals Court further concluded that in light of this power of termination under Condition 30, the Claims Court's finding that the license was terminated for cause is irrelevant; the Appeals Court had interpreted the license de novo and had found a legitimate ground for termination. However, by claiming that the flood control purpose was the reason for the termination, the Court of Appeals did in fact determine that there was "cause" for the termination. Thus, the Court of Appeals made the same errors as the Claims Court, and decided the motion on the issue of cause, an issue not briefed or presented by the parties.

Finally, the Court of Appeals refused to address CAL SAND's estoppel argument claiming that it was not raised in the Claims Court.

REASONS FOR GRANTING THE WRIT

SUMMARY

The Court of Appeals' determination that

Condition 30 permitted cancellation of th license on 30 days notice was erroneous and i direct conflict with rulings of other federa Courts of Appeal. Well established principle of contract interpretation, for example thos approved and applied in Fortec Construction v U.S. 760 F.2d 1288, 1292 (Fed. Cir. 1985) an Julius Goldman's Egg City v. U.S., 697 F.2 1051, 1058 (Fed. Cir. 1983) compel that th Court of Appeals' interpretation is untenabl and unsupported by existing case law. Such drastic departure from judicial preceden deserves this Court's attention.

Secondly, the Court of Appeals determination that there was a flood contro reason which authorized the termination amount to a determination that "cause" existed fo termination. However, the issue of th existence of "cause" was not even raised by th government in its original motion for summar judgment. The issue was neither briefed no argued by the parties, and was not an issue upo

which the Court could properly make a ruling on any basis, much less as a matter of law. Furthermore, the record does not support the conclusion that there is no issue of fact on this point; the evidence even includes the government's own written admission that CAL SAND's performance was "first class". THUS, WHEN RELYING ON COLONEL TAYLOR'S DECLARATION THAT,

> ". . . relatively small amounts of sand and gravel were being removed . . . A large operation was contemplated which would also more quickly help restore the flood control capacity of the basin,"

to support the reasoning that cause existed for termination of the license, the Court had to be relying on the failure of other entities, not CAL SAND, to remove sufficient sand. After all, CAL SAND's performance was "first class". In essence, then, the Court of Appeals determined that the inadequate performance of three entities, over which CAL SAND has no control, was a legitimate ground for termination of CAL SAND's license.

The reasoning involved in this decision i such a departure from the general principles o law established by previous cases, both in th finding that cause existed and in the findin that the "cause" resulting from three entitie other than CAL SAND was sufficient grounds t terminate CAL SAND's license, that this Court should now exercise its power of supervision t remedy the gross errors made by the Court below.

What the Court of Appeals did was to revie a motion for summary judgment brought on tw separate grounds. These grounds were (a) that the parol evidence rule should not be applied t vary the clear meaning of the License Agreement, and (b) that statements from Corps officials did not create contracts to vary or modify the License Agreement. However, rather than considering and ruling on these issues, the Claims Court and the Court of Appeals considered and ruled on a third, the issue for cause. This is an unjustified departure from all accepted standards of construction of the federal rules

of civil procedure, and is such a blatant departure that it is worthy of this Court's attention.

Finally, the Court of Appeals declined to make any comment whatsoever on petitioner's argument that any purported termination would be ineffective due to the pending bankruptcy. This issue would be dispositive of the appeal. Even assuming, arguendo, the Corps had a right to terminate the license, the bankruptcy then pending would make ineffective any attempt to so terminate.

The Court ignored this argument and in doing so worked a result on petitioner which is unduly harsh. Together with the other errors and omissions of the Court, the opinion given on June 27, 1991 represents a gross miscarriage of justice.

REASONS FOR GRANTING THE WRIT

I.

THE CLAIMS COURT AND THE COURT OF APPEALS ERRED IN DETERMINING, AS A MATTER OF LAW, THAT THE LICENSE AGREEMENT COULD BE REVOKED BY THE GOVERNMENT AT ANY TIME WITHOUT CAUSE.

There has never been any dispute as to th government's ability to terminate the Licens Agreement "for cause". However, the issue o "cause" was never presented to the claims court The government never asserted that CAL SAND' license was terminated for cause. The motio for summary judgment, as presented by th government, was based on the argument that th license was simply revocable at will without showing of cause. Thus, the issue of cause wa not before the court for determination. Had th issue been presented, CAL SAND would have mad a full evidentiary presentation raising numerou genuine issues of material fact as to whethe there was, in fact, reasonable "cause" for th termination.

In addition to the fact that the issue wa never presented, and CAL SAND had no notice tha the claims court would base its ultimate orde on a determination on the issue of "cause", th record, even as presented, contains sufficien evidence to raise a genuine issue of materia

fact. The notice of termination did not purport to be based upon any "cause". (App. 311.) There was no evidence in the record that the Corps ever gave CAL SAND any notice to modify its operations in any way or any warning that failure to do so would result in termination of its license. In fact, the record contains evidence that CAL SAND's performance was never criticized and that CAL SAND was actually sent a letter stating that CAL SAND had run a "first-class operation" at Hansen Dam. (App. 331, 353.)

The record also reflects that Mr. Land suggested that CAL SAND try to stay at Hansen Dam as a subcontractor under the new licensee. (App. 354.) Three government representatives, Messrs. Land, Taylor and Cheadle, all assured Mr. King that CAL SAND could relocate to Santa Fe Dam. (App. 354.) Clearly, this was not a situation where CAL SAND was being terminated because of unsatisfactory performance.

On the other hand, the record reflects the

Corps' expressed desire to eliminate the licen
of another licensee, Paul Hurns, who had be
causing significant problems. According to M
King, Mr. Land told him that Mr. Land did n
want Mr. Hurns at Hansen Dam any longer (Ap
353-354); Mr. Land stated that there was no w
Mr. Hurns would be awarded the single contra
for Hansen Dam and that there was no way M
Hurns would be allowed to stay at Hansen D
(App. 357). When Mr. Hurns asked CAL SAND if
could process in their area, Mr. Land told M
King that "if you make any kind of deal wi
him, our relationship is finished." (App. 45
454.) According to Mr. Hurns, he felt CAL SA
and the other licensees had simply been caug
in the middle of Mr. Land's vendetta against M
Hurns. (App. 359-360).

The claims court's determination that,
a matter of law, there was reasonable cause f
terminating CAL SAND's license was obvious
erroneous. Not even the government asser
that the license had been terminated "f

cause". The record clearly raises a genuine issue of material fact as to whether such cause existed. It certainly was not a matter which could have been determined as a matter of law.

The claims court's gratuitous ruling on this issue tainted the entire opinion, because it enabled the claims court to avoid squarely addressing the issue that was presented, i.e., whether the license could be revoked at any time without a showing of cause. As will be discussed infra, the record clearly demonstrates that the license could not be terminated without cause.[2] Since the issue of cause was not presented for, and was not susceptible to, resolution by the motion for summary judgment, the motion should have been denied.

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[2] The claims court itself expressly acknowledged the need for a showing of cause when it stated: "Although the court has no doubt but that the licenses were poorly conceived and administered, that fact cannot deny defendant its rights under the licenses, especially a right to revoke the licenses for reasonable cause." (Op. 15, emphasis added).

Similarly, the Court of Appeals made th same errors. The License Agreement was no revocable at will pursuant to Condition 30 a the Court of Appeals ruled. Such a rulin ignored all principles of contrac interpretation as well as the circumstance surrounding the agreement. The Court of Appeal implicitly acknowledged the problems with thi approach when it reasoned that even if there was a restriction on the Corps right to terminate, the Corps did have the right to terminate in these circumstances. Thus, the Court of Appeals spoke with two voices; in one sentence ruling that the license was revocable at will (as demonstrated later, this is not true) and in the next arguing that even if cause was necessary, cause did exist. Again, however, since the issue of cause was not presented for, nor susceptible to resolution by motion for summary judgment, the opinion of the Claims Court should have been overturned. By not overturning the opinion, the Court of Appeals ignored all

principles of contract interpretation enunciated in existing caselaw, it ignored all canons of construction of the federal rules of civil procedure and it handed down a harsh and unjustified result.

II.

THE LICENSE AGREEMENT COULD NOT BE REVOKED BY THE GOVERNMENT WITHOUT CAUSE.

The key issue presented by the government's motion for summary judgment, is whether the License Agreement should be so interpreted as to allow the government to revoke the license without reasonable cause. It is on this issue that the Court of Appeals snould have focussed. As previously noted, the claims court implicitly acknowledged that reasonable cause would be a prerequisite to revocation, but then erroneously concluded, as a matter of law, that there had been reasonable cause. Similarly, the Court of Appeals conceded that cause was needed for termination and then erroneously concluded that there had been reasonable cause. Since the record contained no evidence whatsoever to

support a finding of cause, and since the issu of cause was never even presented fo determination, the only way that the lowe court's ruling can be upheld is if it i determined that the license could be revoke without cause. CAL SAND respectfully submit that the License Agreement cannot reasonably b so interpreted.

A. Established Principles of Contract Interpretation Require that the License Agreement Be Interpreted as Being Revocable Only for Reasonable Cause.

There are four portions of the Licens Agreement which must be considered i determining whether the license was subject t arbitrary revocation at any time:

1. The standard form printed claus stating that the license was "revocable at th will of the Secretary of the Army";

2. The typed portion of the agreemen defining the license as being for a term of on (1) year and renewable on a year-to-year basi for an additional four (4) years;

3. Condition 12 which reaffirmed that th

license was being issued for a period of one (1) year and was renewable on a year-to-year basis during the next four (4) years, subject to satisfactory performance; and

4. Condition 30 which specified (a) that the license could be revoked at any time when required for flood control purposes, and (b) that the Corps could revoke the license on thirty (30) days' notice. (App. 230-232.)

The provision that the license would be revocable at will, if interpreted literally, would be inconsistent with the provisions specifically defining the term of the license as one (1) year with annual renewals thereafter. When presented with possibly conflicting provisions, established contract principles require that an attempt be made to harmonize the provisions so as to give reasonable meaning to each of the contractual provisions, rather than rendering any portion of the agreement inoperable, meaningless, inexplicable, or superfluous. Fortec Constructors v. U.S., 760

F.2d 1288, 1292 (Fed. Cir. 1985); Seaboa
Lumber Co. v. U.S., 19 Cl.Ct 310, 314 (1990
American Bankers Life Assur. Co. of Florida
U.S., 12 Cl.Ct. 166, 170-171 (1987); Cherry Hi
Sand & Gravel Co., Inc. v. U.S., 7 Cl.Ct. 35
360 (1985); Municipal Leasing Corp. v. U.S.,
Cl.Ct. 43, 46 (1984); Raytheon Co. v. U.S.,
Cl.Ct. 763, 770 (1983), aff'd 730 F.2d 14
(1984).

If the license was interpreted as bei
truly revocable at will, without cause, t
provisions defining the term of the licen
would be meaningless. In fact, there would
no definite term for the license at all;
would simply continue until revoked at t
discretion of the Secretary of the Army.
addition, Condition 30 would be superfluou
there would certainly be no need to specify tha
the license could be revoked if required f
flood control purposes if the license w
revocable at any time without any cau
whatsoever. On the other hand, if the agreeme

is interpreted as allowing revocation only for cause, whether it be war, natural disaster, or unsatisfactory performance by the licensee, then the revocation provision is not inconsistent with the concept of a specified term for the license. In addition, Condition 30 is no longer superfluous but is operable to clarify one specific type of cause that could justify revocation.

To the extent that the provisions of the contract are inconsistent, established contract principles also require that typed provisions control over conflicting provisions in the pre-printed form. Mountain Fir Lumbar Co., Inc. v. U.S., 12 Cl.Ct. 521, 526 (1987). In this case, the provisions specifying the one/five-year term of the agreement were typed in to tailor the agreement to reflect the terms of CAL SAND's particular license. Those provisions must be given precedence over the pre-printed "revocable at will" language.

Condition 30, which specified that the

license could be revoked in one specif situation, i.e., when required for flood contr purposes, was also a typed provision tailor specifically for CAL SAND's agreement and shou be afforded greater consideration that the pr printed "revocable at will" language. To t extent that Condition 30 specified one situati in which the license could be revoked, t doctrine of expressio unius est exclus alterius requires that the contract be construe as not allowing revocation except in tha situation. Public Utility Dist. No. 1 v. U.S. 20 Cl.Ct. 696, 700 (1990). The format of th License Agreement, which consisted of very sho numbered paragraphs which each dealt with single issue, also demonstrates that the seco sentence of Condition 30 regarding revocation thirty days' notice related back to the firs sentence regarding possible revocation required for flood control purposes. (App. 23 236).

Finally, latent ambiguity presented by th

provisions specifying a defined term for the license and the provisions regarding possible revocation of the license must be construed against the government as the drafter of the agreement. Lang Bros., Inc., v. U.S. 20 Cl.Ct. 551, 554 (1990); Seaboard Lumber Co. v. U.S., 19 Cl.Ct. 310, 315 (1990). This rule of contract interpretation has been strictly construed against the government, as follows:

> Plaintiff is not required to have construed the ambiguous provision in a more reasonable manner that did defendant. Rather, if "the contractor follows an interpretation that is reasonable, this interpretation will prevail over one advanced by the Government, even though the Government's interpretation may be a more reasonable one since the Government drafted the contract". Neal & Co., Inc. v. U.S., 19 Cl.Ct. 463, 473 (1990) (quoting United Pacific Ins. Co. v. U.S., F.2d 1402, 204 Cl.Ct 686 (1974).)

The Court of Appeal did not apply these principles of interpretation. Accordingly, its decision is in direct conflict with at least one other federal Court of Appeals case [Fortec Constructors v. U.S., 760 F.2d 1288 (Fed. Cir.

(1985)] and other well established, wel
recognized principles of law.

**B. Extrinsic Evidence, Properly Considered t
Aid in the Interpretation of the Agreement,
Demonstrates That the Government Consistentl
Interpreted the Agreement as Being Revocable
Only for Cause.**

It is well recognized that a contract i
ambiguous so as to require the consideration o
extrinsic evidence to aid in its interpretatio
when the contract is reasonably susceptible t
more than one interpretation. Seaboard Lumbe
Co. v. U.S., 19 Cl.Ct. 310, 315 (1990).

In this case, the government urged that th
License Agreement should be reasonably construe
as authorizing revocation without cause
However, as discussed supra, the Licens
Agreement may also be reasonably construed a
only authorizing revocation with cause; in fact
CAL SAND respectfully submits that that is th
only reasonable interpretation possible afte
application of the established principles o
contract interpretation. Assuming arguendo
however, that the government presented

reasonable alternative interpretation, the court must consider extrinsic evidence to interpret the contract.

By failing to consider the following extrinsic evidence, the Court of Appeals again erred and again did so blatantly. The Court did not consider and then reject the extrinsic evidence, nor did the Court consider the evidence but find it uncompelling. Rather, the Court of Appeals ignored the evidence thereby committing a grave error.

Consideration of extrinsic evidence to aid in the interpretation of an agreement does not violate the parol evidence rule. Towne Realty, Inc. v. U.S., Cl.Ct. 264, 269 n.5 (1982) (agreements and negotiations prior to, and contemporaneous with, adoption of a writing are admissible in evidence to establish meaning of writing, whether or not integrated). In addition, it is particularly instructive to consider the conduct of the parties following execution of the agreement but before the

dispute arose to determine the meaning of t agreement. Julius Goldman's Egg City v. U.S 697 F.2d 1051, 1058 (Fed. Cir. 1983), cert. de 464 U.S. 814 (1984). Evidence of an establish course of dealing, trade usage, or custom shou also be considered. Blue Cross and Blue Shie Ass'n v. U.S., 17 Cl.Ct. 558, 564 (1989); Hae Management Co. v. U.S., 15 Cl.Ct. 50, 59 (1988 aff'd 878 F.2d 1445 (1989).

In this case, the extrinsic evidence in t record unequivocally establishes that t government recognized and acknowledged that t license could only be revoked for cause. excerpt from an internal government publicati discussing government licenses expressly state

> Termination. A license is revocable at any time by licensor, unless otherwise stated in the license. District Commanders have been delegated authority to revoke licenses; however, sufficient justification for such revocation must be shown, such as a breach of any condition imposed in the license or need for the property by the United States. (App. 142, emphasis added.)

The Court of Appeals acknowledged th

restriction on the Corps' freedom to terminate, again implicitly conceding that "cause" was a prerequisite to termination. Nevertheless, the Court totally failed to reconcile this concession with its opening statement that the license could be terminated on 30 days notice, without cause.

The record also contains a Memorandum, dated September 22, 1983, from J.P. Fast as Chief of the Construction -- Operations Division of the Corps, to Steve Temmel, requesting a legal opinion as to the potential bases for terminating the Hurns license, and noting that termination of the other licenses should not pose a problem because they "expire no later than early 1984." (App. 252.) There certainly would have been no reason for such a comment if the government believed that the licenses could simply be revoked at any time.

The record contains a Memorandum dated March 2, 1984, from William P. Cheadle, Jr., as Chief of the Real Estate Division of the Corps

to the Commander, South Pacific Division, which Mr. Cheadle states his erroneous beli that the CAL SAND license had been renewed or month-to-month basis and was revocable at t will of the Secretary of the Army upon writt notice. (App. 288.) It is evident that M Cheadle's belief that CAL SAND's license cou be revoked at any time was based upon his beli that the terms of the License Agreement had be amended to convert the license to a month-t month arrangement.

In a Memorandum dated March 2, 1984 fr Gary R. Lord, Colonel, C E Deputy Commander the Commander, Los Angeles District, Mr. Lo states:

> There appears to be no problem with the termination of four of the licenses (Nos. DACW09-3-83-12; DACW09-3-82-29; DACW09-3-82-46; and DACW09-3-84-28) as it appears the initial terms thereof have expired and the licensees are now being allowed to continue operation on a month-to-month arrangement, subject to termination by providing the licensees with thirty-day written notices. (App. 294.)

The Memorandum goes on to discuss the potential termination of the Hurns License which was not on a month-to-month basis. In that regard, Mr. Lord notes that the District Commanders have been delegated authority to terminate licenses, but he notes that "sufficient justification for such termination must be shown, such as a breach of any condition imposed in the license or need for the property by the United States." (App. 294.) Mr. Lord goes on to note that, since Mr. Hurns took corrective action each time he was advised that he was violating the terms of his license, there was no current cause or justification for termination of his license. Mr. Lord recommended written notice to Mr. Hurns that any further violation would result in termination of his license. Obviously, Mr. Lord believed that the government's right to terminate the other licenses without cause was premised upon the licenses having been effectively converted to month-to-month terms.

When the government sent out its Reque for Proposals for Hansen Dam in 1984 (App. 26 287), the request notified interest contractors of the terms and conditions of t license by providing a copy of the form to used for the license agreement (App. 271-273 A review of Condition 11 of the form agreeme reveals that the government's right to revo the license if required for flood contr purposes was stated as follows:

> The United States reserves the right to revoke this license, upon 30 days notice, for flood control purposes as determined by said officer. (App. 272.)

The fact that the government restated t condition for flood control conditions in i subsequent contract in one sentence demonstrat that the first and second sentence of Conditi 30 in CAL SAND's License Agreement were intend to be read together as relating to the sa subject.

It should also be noted that, when t government entered into its new Licen

Agreement with Channel & Basin, it included a very specific Condition 13 reserving the right to revoke the license at any time based upon a material breach of the terms of the license Agreement. (App. 297-298.) That same language was included in Condition 11 of the form agreement that was attached to the Request for Proposals. (App. 272.) There would have been no need for such a provision if the printed "revocable at will" language, which was also in those License Agreements, meant that the license could be revoked at any time without cause.

The government's conduct in preparing Amendment 5, which it apparently intended to use to convert CAL SAND's license to a month-to-month arrangement which could be terminated on thirty (30) days' notice, is further evidence that the government recognized that the license, as originally structured, could not be terminated without cause. (App. 334-336.) If the original license could have been revoked at any time without cause, there would have been no

need for such an Amendment 5 to convert th license to a month-to-month agreement. Th government's recognition that it would need t take steps to facilitate termination of th licenses, once a new single licensee wa selected, was obviously the precipitating facto for the preparation of Amendment 5.

Finally, Mr. King's declaration states tha he was told by Corps officials that th "revocable at will" language referred t situations where the United States might nee the property due to some extraordinary event such as war, and that Condition 30 would onl apply in flood control situations. (App. 352. Corps officials' own understanding an interpretation of the provisions is obviousl probative of the intended meaning of thos provisions.

III.
THE COURT OF APPEALS CANNOT CITE THE INADEQUACY OF THREE ENTITIES OVER WHICH CAL SAND HAD NO CONTROL AS REASONS FOR TERMINATIN "FOR CAUSE" CAL SAND'S LICENSE.

The government had no grounds fo

terminating CAL SAND's contract; the "cause" cited by the Court of Appeals was a lack of performance on the part of other entities. However, it is fundamental, blackletter law that a breach of contract is a failure to perform any promise which forms part of the contract (4 Corbin §943; 11 Williston 3d §1290 et seq.). CAL SAND did not fail to perform; in fact, even the government acknowledged that CAL SAND's performance was "first-class". (App. 331, 353).

If sediment was not being removed in sufficient quantities, the fault lay with operators other than CAL SAND. Maybe, the government had cause to terminate such operations. It did not, however, have cause to terminate CAL SAND. The government cannot terminate one operator because of the breach of others. Nor should the Court of Appeals sanction any such purported termination.

IV.
THE LICENSE AGREEMENT WAS NEVER EFFECTIVELY TERMINATED.

Even if the License Agreement could have

been terminated without cause, no su
termination was ever actually effected. T
only notice of termination ever given was t
notice that purported to rely upon Amendment N
5, which had never been transmitted to,
signed by CAL SAND. (App. 354-356.) Assumin
arguendo, that the purported reliance up
Amendment No. 5 would not have invalidated th
notice if the Corps did, in fact, have the righ
to terminate the license at any time withou
cause, the notice would still not have bee
effective.

At the time the notice was sent, Unite
States bankruptcy proceedings were pending whic
would have prevented the notice from bein
effective, even if otherwise valid. (App. 345
346.)[3] Subsequently, the Corps filed a motio
for relief from the automatic stay in th
bankruptcy court. The motion was set over fo

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[3] The actual entity which filed a Chapter 11 reorganization proceeding was Illinois-California Sand and Gravel, Inc., the parent corporation of Cal Sand. (App. 345.)

trial but, the day before trial, the Corps requested a continuance and never took any further action to reset the trial date. (App. 348.)

The government itself acknowledged that no valid notice of termination was ever given. By Memorandum dated March 31, 1986, some two years after the original purported termination, the chief of Management and Disposal inquired of the Office of Counsel as follows:

> 1. Review of the Real Estate Division records finds that five (5) licenses at Hansen Dam that should have been terminated have not been. All appear to have been involved in recent litigation with the U.S. Government and to have been granted judicial protection by the Bankruptcy and/or District Federal Courts. . .
>
> 2. If all litigation has been completed, request permission to terminate all five (5) licenses in accordance with the order(s) of the court(s). (App. 350, emphasis added.)

Having failed to effectively terminate CAL SAND's license, the government violated the terms of the license, and the implied covenant of good faith and fair dealing, by allowing

another contractor to enter into the area ov
which CAL SAND still held an exclusive licens

This argument, which was expressl
presented to the Court of Appeals, was totall
ignored by that Court. The arguments is
especially compelling one and goes directly
the heart of CAL SAND's complaint. For even
Condition 30 gave the Corps the right
terminate at will (as the Court of Appeals fou
as a matter of law), any notice to terminat
would have been ineffective because of th
bankruptcy.

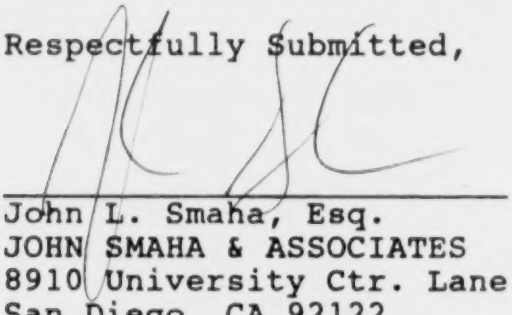
The Court of Appeals did not mention thi
argument in its opinion, did not reconcile
with its own findings nor reject it or discredi
it on any legal theory. However, it is a ver
relevant argument. Assuming arguendo that th
Court of Appeals properly concluded tha
Condition 30 gave an unconditional right
terminate, as a matter of law, the bankrupt
proceedings mean that the license was neve
effectively terminated, notwithstandi

Condition 30. Thus the Court of Appeals could have found an unrestricted right to terminate, but would still have been precluded from affirming the opinion of the Claims Court which dismissed the complaint.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully Submitted,



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JLS-282

APPENDIX

NOTE: Pursuant to Fed. Cir. R. 47.8, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERA CIRCUIT

91-5026

CALIFORNIA SAND AND GRAVEL, INC., HANSEN BASIN SAND AND GRAVEL, INC., ILLINOIS-CALIFORNIA SAND AND GRAVEL, INC., AND RECON INVESTMENTS, INC.,

Plaintiffs-Appellants

v.

THE UNITED STATES

Defendant-Appellee.

DECIDED: June 27, 1991

Before MAYER, Circuit Judge, COWEN, Senio Circuit Judge, and CLEVENGER, Circuit Judge.

PER CURIAM.

DECISION

The judgment of the Claims Court dismissi the complaint of California Sand and Gravel Inc., 22 Cl.Ct. 19 (1990), is affirmed.

OPINION

On its face, condition 30 permits cancellation of the license with thirty days notice; Cheadle's April 10, 1984, termination letter met that requirement. Even if the first sentence of condition 30 placed an additional restriction on the Corps' freedom to terminate by requiring a flood control purpose, Col. Taylor's declaration supplied it, unrefuted by California Sand. He explained:

> While relatively small amounts of sand and gravel were being removed by three of these licensees, the silt remained . . . [and] I, as the District Engineer, determined that it would be in the public interest to again solicit proposals from the industry to remove silt as well as sand and gravel from the Hansen Dam Flood Control Basin. A large operation was contemplated which would also more quickly help restore the flood control capacity to the basin.

The trial court's purported finding that the licensees failed to perform adequately is irrelevant because as a matter of law the Corps could terminate the license under condition 30 here. This moots California Sand's argument

that whether the Corps had "cause" f termination is an issue of material fact whi was improperly decided by the Claims Court summary judgment. Interpretation of the licen is a matter of law which we review de nov Reliance Insurance Co. v. United States, 9 F.2d 863, 865 (Fed. Cir. 1991).

At argument, the government conceded tha though the license did not require any reas for termination, the Corps' internal guideline in Engineer Pamphlet 405-1-2, section IV, di place an additional restriction, voluntaril assumed, on its freedom to terminate. Th guidelines require "sufficient justificatio for terminating a license which includes reasonable need for the property by the Unite States." The Corps needed the basi unencumbered by nonexclusive licenses so i could offer the incentive of an exclusiv license to attract a larger operation capable o removing more sediment from the basin an improving the basin's flood control capacity

This satisfies the requirement.

We do not address California Sand's estoppel argument because it was not raised in the Claims Court. Cedar Lumber, Inc. v. United States, 857 F.2d 765, 767 (Fed. Cir. 1988) ~~n.s-274~~

IN THE UNITED STATES CLAIMS COURT

No. 280-89C

(FILED: November 14, 1990)

* *

CALIFORNIA SAND AND GRAVEL, INC., HANSEN BASIN SAND AND GRAVEL, INC., ILLINOIS-CALIFORNIA SAND AND GRAVEL, INC., AND RECON INVESTMENTS, INC.,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

* *

John L. Smaha, San Diego, California, fo plaintiffs.

Odessa P. Jackson, with whom was Assistan Attorney General Stuart M. Gerson and Directo David M. Cohen, for defendant.

ORDER

TIDWELL, Judge:

This case is before the court on defendant's motion to dismiss or in the alternative, for summary judgment. Plaintiffs opposed the motion.

FACTS

In 1941, the Army Corps of Engineers designed and constructed Hansen Dam to control Los Angeles Basin flood waters. The Corps initially allocated a portion of the pool storage capacity for sediment deposits that subsequently proved insufficient because of heavy rains, and the residue of fire. Excavating the dam was expensive, and budgetary constraints led to an innovative program under which the Corps granted four licenses for the excavation and sale of sand and gravel from the pool for five cents a cubic yard. Each licensee had a designated excavation area within the

basin, as well as an area in which to set up processing plant. On March 26, 1982, the Cor issued an excavation license to California Sa and Gravel, Inc. that provided in part:

> The Secretary of the Army hereby grants to California Sand and Gravel, Inc., a California Corporation . . . a license for the period of one year commencing on 29 March 1982 and ending on 28 March 1983, and thereafter renewable on a year-to-year basis during an additional 4-year term, to 28 March '87, but revocable at the will of the Secretary of the Army, to remove 600,000 cubic yards of sediment annually from the Hansen Dam Basin.[4]

Conditions 12 and 30 of the license provided, respectively:

> 12. The license is to be issued for a period of one year and renewable on a year-to-year basis during the next four year [sic], subject to satisfactory performance by the

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[4] Two other licenses contained the same language as in plaintiff's license. The fourth license, governing the remaining licensee, Mr. Paul Hurns, was for a set period of five years.

licensee.

> 30. Unless otherwise specified herein, the license may be revoked or cancelled at any time when required for flood control purposes. The Corps of Engineers shall reserve the right to revoke th s [sic] license on 30 days notice.

Under Army regulations, contracting authority lies with the Secretary of the Army who can delegate the authority to appropriate persons. In this case, the Secretary had delegated contracting authority to the Chief of Engineers, the Deputy Chief of Engineers, and the Director of Real Estate. These officers then could re-delegate the authority in writing to other officers whom they, respectively, supervised.[5] According to the letter of

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[5] The pertinent part of the full provision reads:

> [A]uthority is hereby granted to the Chief of Engineers, the Deputy Chief of engineers, and the Director of Real Estate, or any of them, to approve,

delegation applicable to the Hansen Dam project Colonel Taylor, the District Engineer, and Mr William Cheadle, the District Chief of Rea Estate, were the only officers with contractin authority to approve, execute, amend, renew revoke, or terminate California Sand an Gravel's license. The District Chief o Operations, Mr. Robert Land, did not have tha authority.

Subsequent to execution of the lease, Mr John H. King, introduced himself to certai unidentified District or Division officer

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> execute, amend, renew, revoke, and terminate in the name of and by authority of the Secretary of the Army, licenses granting the use of real property under the jurisdiction of the Army . . . The authority hereby delegated may be redelegated in writing to Division Engineers with authority to redelegate to their Chiefs of Real Estate Divisions, or to their District Engineers with authority to redelegate to their Chiefs of Real Estate divisions.

explaining that he was considering the purchase of California Sand and Gravel, and wanted to discuss certain provisions, as well as any problems that might occur with the license because of a change in ownership of the licensee. In response to Mr. King's questions, the District officers allegedly explained that condition 30 of the license meant the Army would cancel California Sand and Gravel's license only in case of a flood or disaster. When Mr. King asked what "revocable at the will of the Secretary of the Army" meant, these same unnamed officers allegedly told him that the government would terminate pursuant to this clause only in the case of war or national disaster. Plaintiff also alleged that he was assured yearly reapplication for the license was unnecessary as the Army would renew it automatically each year for the five-year term, so long as plaintiff's

work was satisfactory. Plaintiff maintained that these verbal assurances constituted binding agreements.

Mr. King eventually purchased plaintiff California Sand and Gravel. Its relationships with the other three plaintiffs arose through a convoluted series of transactions. Originally, California Sand and Gravel was a wholly owned subsidiary of Recon Investments, Inc. (Recon). Mr. King then formed Illinois-California Sand and Gravel, Inc. (Illinois-California) which obtained a controlling interest in recon and purchased all of Recon's California Sand and Gravel Stock. The result was that Illinois-California now controlled both California Sand and Gravel and Recon. In order to attract additional capital, Mr. King formed a general partnership known as Hansen Basin Sand and Gravel (Hansen Basin) to control Illinois-

California. Mr. King did not insist on renegotiating the license to include Illinois-California, Recon, or Hansen Basin; neither was the license assigned.

At some point, California Sand and Gravel encountered start-up problems with its plant. Therefore, the parties amended the license to establish the run of the first term from March 28, 1982, to July 29, 1982. By July 29, 1983, plaintiff had not received any notice of renewal, but continued to operate with no objection from defendant.

Sometime in early 1982, discord developed between the Corps and Paul Hurns, who allegedly had removed sediment and silt from outside his license area. California Sand and Gravel also experienced problems with Hurns, and eventually instituted legal action against him.

In late 1983, the Corps informed Mr. King

that it intended to select a single, exclusive licensee to operate at Hansen Dam Basin because the four current licensees had not removed enough sediment and silt, thereby creating possible flood conditions. In early March of 1984, Mr. Land and District Chief of Operations, informed Mr. King that Channel and Basin Reclamation, Inc. (Channel) likely would be the new licensee.[6] Mr. Land allegedly encouraged Mr. King to subcontract to Channel. Mr. Land also allegedly told Mr. King that, if California Sand and Gravel would relinquish its claims under the Hansen Dam license, defendant would grant plaintiff a new license to excavate

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[6] The Corps issued a Request for Proposals seeking a single licensee to excavate sediment and silt from the Hansen Dam pool. The license was for five years. All interested parties, including plaintiffs, had an opportunity to compete for the license. The record does not show whether plaintiffs participated in the competition, but that fact is not relevant to our findings today.

material at the Santa Fe Dam. Mr. King alleged that shortly thereafter he met with the District Engineer and the District Chief of Real Estate, who both told him that anything he worked out with Mr. Land would be fine with them.

On April 9, 1984, the Corps executed an exclusive five-year license with Channel to operate at Hansen Dam. One day later, on April 10, 1984, defendant terminated plaintiff's license based on paragraph two of what has been described as Amendment Five to the license, to with: "this license may be terminated at any time by the Government by giving a 30-day advance written notice to the licensee." Paragraph one of Amendment Five, which the court will address later in this opinion, stated "[t]hat the term of the license is extended on a month to month basis beginning on 1 August 1983, subject to the same conditions as

contained in same (sic) license as amended. However, amendment five never was executed an was thus, a nullity. Shortly thereafter plaintiff approached Channel with an offer t subcontract. Channel declined.

On May 9, 1984, Mr. King sent two letter to the District Chief of Operations. The firs confirmed that plaintiff would vacate the Hanse Dam premises. The second requested that th Corps grant plaintiff a license to remov sediment and silt at the Santa Fe Dam project Soon after sending the letters, plaintiff sen defendant a proposal for operation under license at the Santa Fe Dam project as h allegedly had discussed with Mr. Land. In lat June, defendant denied plaintiff's transfer t the Santa Fe Dam project stating that the Arm would award those licenses competitivel according to Corps regulations.

On May 15, 1989, California Sand and Gravel, Illinois-California, Recon, and Hansen Basin filed a complaint in this court claiming damages for breach of contract on the Hansen Dam license, breach of oral contract on the "agreement" that the license automatically was renewable for four year, breach of the implied covenant of good faith and fair dealing premised on defendant's grant of the exclusive Hansen Dam license to Channel, and wrongful termination of plaintiff's license agreement for the sole reason of removing all the contractors at the dam in order to oust Paul Hurns.

DISCUSSION

Pursuant to RUSCC 12(b)(1) and (4), defendant moved for dismissal for lack of subject matter jurisdiction and failure to state a claim upon which relief could be granted. In the alternative, defendant moved for summary

judgment. Because matters outside the pleadin were included in the motion papers, the cou will consider the motion as one for summa judgment. See, William F. Reade v. Unit States, 14 Cl. Ct. 531, 532 (1988). Summa judgment is appropriate only when there are r material issues of fact so that the moving part is entitled to judgment as a matter of law Anderson v. Liberty Lobby Inc., 477 U.S. 242 250 (1986); Mingus Constructors, Inc. v. Unite States, 812 F.2d 1387, 1390 (Fed. Cir. 1987) Hendricks v. United States, 10 Cl. Ct. 703, 70 (1986). For purposes of this motion, the cour will view all evidence and inferences in th light most favorable to plaintiff. Litto Indus. Prods., Inc. v. Solid State Sys. Corp. 755 F.2d 158, 163 (Fed. Cir. 1985); D.L. Aul Co. v. Chroma Graphics Corp., 714 F.2d 1144 1146 (Fed. Cir. 1983).

1. **JURISDICTION**

This court's jurisdiction is defined by the Tucker Act, 28 U.S.C. § 1491 (1988). The Tucker Act alone does not create a substantive right to recover money, but instead waives sovereign immunity under specific conditions. United States v. Mitchell, 445 U.S. 535, 538 (1980). In order for this court to exercise jurisdiction over plaintiffs' claims, the claims must be predicated on a constitutional provision, statute, executive department regulation, or an express or implied contract with the United States. 28 U.S.C. § 1491(a)(1) (1988). Plaintiffs satisfied this requirement by seeking recovery under its license to remove sediment and silt from the Hansen Dam Basin. However, for jurisdictional purposes, privity of contract also is a necessary prerequisite to maintaining a suit against the government in the Claims

Court. See, e.g., Thomas Funding Corp. United States, 15 Cl. Ct. 495, 499 (1988).

Defendant moved to dismiss portions of t complaint because there was no privity contract between defendant and three of t plaintiffs: Illinois-California, Recon, a Hansen Basin. Absent privity, a party lac standing to sue; without standing, the court i without jurisdiction to resolve issues raised b that party. Plaintiffs insisted that privit arose under California Sand and Gravel' obligation to disburse to the three othe plaintiffs part of California Sand and Gravel' income from the license. Plaintiffs also argue that the privity issue is premature because i properly will arise only in the damages phase o this case. The court believes that th interests of all parties are better served b addressing jurisdiction at the outset of thes

proceedings.[7]

Plaintiffs asserted that California Sand and Gravel, Hansen Basin, Recon, and Illinois-California all are "real part[ies] in interest" within the confines of RUSCC 17(a). A "real party in interest" is the party that "possesses the substantive right under which suit is brought." Wall Indus., Inc. v. United States, 15 Cl. Ct. 796, 803 (1988), aff'd, 883 F.2d 1027 (Fed. Cir. 1989). Citing Prevor-Mayorsohn Caribbean, Inc. v. Puerto Rico Marine Management, Inc., 620 F.2d 1 (1st Cir. 1980), plaintiffs Hansen Basin, Recon, and Illinois-California argued that their various relationships with California Sand and Gravel are sufficient to give all four plaintiffs the

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[7] This court is obligated to address its jurisdiction, even sua sponte. Artic Corner, Inc. v. United states, 845 F.2d 999, 1000 (Fed. Cir. 1988).

substantive right to bring suit because al benefitted from the operation at Hansen Dam. The court, however, believes that plaintiffs' reliance on Prevor is misplaced. In Prevor, plaintiff Prevor-Mayorsohn Caribbean, was a subsidiary of Prevor-Mayorsohn Internaticnal (International). International owned produce that was shipped and damaged on defendant's vessel. Plaintiff, named as consignee in the bills of lading, sued for damages. On appeal, the United States Court of Appeals for the First Circuit held that even though International was the owner of the goods, its subsidiary consignee had sufficient interest to sue. Id. at 4. Unlike Prevor, in the case at hand the relationships amongst the four plaintiffs did not exist at the time California Sand and Gravel entered into the license agreement with defendant. Moreover, Prevor addressed the

rights of parties as specifically spelled out in the Uniform Commercial Code for negotiable bills of lading, not the rights of parties vis-a-vis a government contract.

Plaintiffs also argued that RUSCC 19, as applied in Bonar, Inc. v. Schottland, 631 F.Supp. 990 (E.D. Pa. 1986), compels the joinder of Illinois-California, Recon, and Hansen Basin. Bonar required joinder of a corporate parent that had an interest identical to that of its subsidiary. 631 F.Supp. at 999. Though Bonar is insightful, it is not binding on this court. Moreover, this court does not interpret RUSCC 19 to compel joinder in this case, primarily because waivers of sovereign immunity are to be construed strictly. United States v. Mitchell, 45 U.S. 535, 538 (1980); United States v. King, 395 U.S. 1, 4 (1969); United States v. Johnson Controls, Inc., 713 F.2d 1541, 1557 (Fed. Cir.

1983).

Plaintiffs asserted that jurisdiction ove Illinois-California, Hansen Basin, and Reco would be proper pursuant to section 609 of th Contracts Dispute Act, 41 U.S.C. §§ 601-61 (1987), which provides for judicial review of a adverse decision by the contracting officer. The court cannot agree. Claims Court jurisdiction under the CDA is proper only after submission of a certified claim to the contracting officer, and the contracting officer's issuance of a final decision on the claim. Paragon Energy Corp. v. United States, 645 F.2d 966, 967 (Ct. Cl. 1981); Overall Roofing & Constr., Inc. v. United States, 20 Cl. Ct. 181, 183 (1990); 41 U.S.C. § 605 (1987). Plaintiffs have not completed these requisite steps and, therefore, cannot invoke jurisdiction pursuant to the Contract Disputes Act.

For the reasons stated above, the court is of the opinion that California Sand and Gravel is the only plaintiff that may maintain an action against the government based upon the license. The court therefore dismissed for want of jurisdiction (i.e., lack of privity) those portions of the complaint which relate to Recon, Hansen Basin, and Illinois-California. This is not to say, however, that the other companies may not have a legal remedy against the sole remaining plaintiff.

II. Extrinsic Evidence

Plaintiff California Sand and Gravel asserted that defendant orally agreed to three matters outside the written contract: that (1) California Sand and Gravel could move to Santa Fe Dam in consideration for a release of claims against defendant for early termination at Hansen Dam Basin; (2) that plaintiff's license

was renewable automatically for a period of four more years; and (3) termination "at the will of the Secretary of the Army" meant defendant would cancel the license only in times of flood, war, or national emergency. In it's [sic.] motion to dismiss, defendant argued that the parol evidence rule precludes the court from considering extrinsic evidence that would vary the clear meaning of the license.

The parol evidence rule is not a rule of evidence, but a rule of substantive law that prevents the use of extrinsic evidence to add to or modify the terms of an integrated contract, i.e., a writing the parties have adopted as an expression of their final agreement. E.G., David Nassif Assocs. v. United States, 557 F.2d 249, 256 (Ct. Cl. 1977). The rule prohibits parties from varying integrated agreements by introducing evidence of inconsistent prior or

contemporaneous terms. Montana Power Co. v. United States, 8 Cl. Ct. 730, 735 (1985); De Barros v. United States, 5 Cl. Ct. 391, 395 (1984). Therefore, critical to the resolution of any parol evidence problem is the question of integration. Montana Power, 8 Cl. Ct. at 735; Restatement (Second) of Contracts § 209 (1979).

Plaintiff, citing Campbell v. United States, 661 F.2d 209, 218 (Ct. Cl. 1981), argued that the license was not integrated completely because it lacked an integration clause. This court is unable to read Campbell as supportive of plaintiff's position. The disputed writing in Campbell stated that the contract contained the entire understanding of the parties. Campbell concluded that given the agreement's "specificity . . . and its disavowal of any undertakings save those specifically enumerated--it [was] a fair bet that the parties agreed to

no more than they said." 661 F.2d at 218. Campbell did not hold that an integration clause is requisite to a finding of integration; it merely upheld the plain language of the contract. Neither an integration clause nor the writing itself is conclusive in determining integration because "the writing cannot prove its own integration." Sylvania Elec. Prod., Inc. v. United States, 458 F.2d 994, 1006 (Ct. Cl. 1972). A document is integrated if the court finds that the parties to the agreement intended it to be the final, complete, and exclusive manifestation of the terms of their agreement. Nassif, 557 F.2d at 256.

Plaintiff attempted to establish that the parties did not intend the license agreement to be final and exclusive by showing that it later was modified by at least four written amendments. This court, however, has never held

that legitimate subsequent modifications indicate a written license was not final and completely integrated. Only actions and negotiations prior to, or contemporaneous with, the execution of the license would have any relevance. See, Northbridge Elecs. v. United States, 175 Ct. Cl. 426, 438 n.8 (1966); J. Cibinic & R. Nash, Administration of Government Contracts 131-36 (1985). Parties often reasonably cannot anticipate every possible need at the time they make an agreement. The mere fact that the parties modified the contract to accommodate changed circumstances doe not, in and of itself, indicate they did not intend the agreement to be final when signed.

Absent evidence establishing that the writing, in fact, did not constitute a final expression, the general rule for determining integration is that where the terms on the whole

are complete and specific, the written contrac
"is presumed, in law, to express the fina
understanding of the parties." Brawley v
United States, 96 U.S. 168, 173-74 (1878)
Merando, Inc. v. United States, 475 F.2d 603
605 (Ct. Cl. 1973); Peterson-Sharpe Eng'g Corp.
v. United States, 6 Cl. Ct. 288, 296 (1984).
That is the case here. The existence of a
specific, executed, written contract compels the
court to conclude that the parties intended the
license to be integrated completely, and parol
evidence may not vary its terms. Peterson-
Sharpe, 6 cl. Ct. at 296; Sea-Land, Serv., Inc.
v. United States, 553 F.2d 651, 656 (Ct. Cl.
1977) cert. denied, 434 U.S. 1012 (1978). As
the Supreme Court stated in Brawley, "[t]he
written contract merged all previous
negotiations, and is presumed, in law, to
express the final understanding of the parties.

If the contract did not express the true agreement, it was the claimants folly to have signed it." 96 U.S. at 173.

A. The Santa Fe Dam Agreement

Consideration of subsequent modifications is not barred by the parol evidence rule. The court may consider the merit of the subsequent statements themselves to determine whether they constitute valid modifications to the underlying contract. Montana Power Co., 8 Cl. Ct. at 736.

Plaintiff claimed that defendant, through Mr. Land, verbally agreed that plaintiff could move to Santa Fe Dam in consideration for defendant's early termination of the Hansen Dam Basin License, and the waiver of any claims that might arise from the early termination. Defendant argued that Mr. Land's alleged statements did not modify or create a new contract because those statements were beyond

the scope of Mr. Land's authority to bir defendant.

To recover under a contract with the Unite States, plaintiff must show that the "office whose conduct is relied upon had actua authority to bind the government in contract. H.F. Allen Orchards v. United States, 749 F.2 1571, 1575 (Fed. Cir. 1984), cert. denied, 47 U.S. 818 (1985); OAO Corp. v. United States, 1 Cl. Ct. 91, 99 (1989). Persons who contrac with the government take upon themselves th "risk of having accurately ascertained that h who purports to act for the [G]overnment stay within the bounds of his authority." Federa Crop Ins. Corp. v. Merrill, 332 U.S. 380, 38 (1947). Plaintiff claimed that the Distric Engineer and the District Chief of Real Estate both of whom possessed the requisite contractin authority, told Mr. King to "work something ou

with Land."[8] Plaintiff's contentions are without merit because any alleged delegation of authority to District Chief of Operations Land, who was not an authorized delegatee, necessarily would have been ineffective. It may not be equitable, but it is the law, and it is the duty of this court to apply the law the way it was written by the Congress and interpreted by the United States Court of Appeals for the Federal Circuit and the Supreme Court. This court virtually has no "equitable" authority, and what does exist is inapplicable to the facts of this case.

Plaintiff also asserted that the District Engineer and the District Chief of Real Estate granted Mr. Land implied actual authority. Plaintiff based its argument on H. Landau & Co.

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[8] Defendant denies that it ever told Mr. Land to reach an agreement with Mr. King.

v. United States, 16 Cl. Ct. 35 (1988), vacate
on other grounds, 886 F.2d 32? (Fed. Cir. 1989)
In Landau, a supplier to a government contracto
brought an action claiming that the governmen
had guaranteed payment, but thereafter failed t
pay for materials for supplier delivered to th
government contractor. The Claims Court hel
that the supplier could not recover from th
government because the agent who guarantee
payment lacked authority to bind the government
Landau, 16 Cl. Ct. at 38.

On appeal, the Federal Circuit raised th
issue of implied actual authority which, i
found, would bind the government. Landau, 88
F.2d at 324. According to the Federal Circuit
actual authority may be implied when suc
authority is an "integral part of the dutie
assigned to a government employee." 886 F.2d a
324 (quoting J. Cibinic & R. Nash, Formation o

Government Contracts 43 (1982). In Landau, the agent of the government who made the guaranty was not a contracting officer, but did possess actual authority to draw checks on a joint bank account. The court held that such express authority might carry with it the implied authority to guarantee payment from that account. Landau, 886 F.2d at 324. The Federal Circuit remanded Landau to the Claims Court for a finding of whether the agent did possess implied actual authority. The Claims Court found that he did not. "It was not [the agent's] responsibility to assure that the contract was performed" and he did not have "day-to-day responsibility regarding performance of the contract." H. Landau & Co. v. United States, 20 Cl. Ct. 400, 406 (1990).

The court is of the opinion that, in some circumstances, a person with some limited actual

authority impliedly may have broader authorit
However, a person with no actual authority m
not gain actual authority through the court-ma
rule of implied actual authority. Specificall
the court may not substitute itse
unconditionally for the executive in granti
authority to an unauthorized person. The mo
the court can do is interpret the limite
authority of an authorized person in a broade
manner than ordinarily would be the case. As
predicate to a finding of implied actu
authority, there must be, at the least, so
limited, related authority upon which the cou
can "administer" the law so as not to ignore t
policies and decisions of those persons charge
with managing government programs. The cou
believes that Landau and the theory of impli
actual authority is of limited application, a
was not intended to repeal the long establishe

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rule that, when dealing with the government, only government agents with actual authority can make a contract, express or implied. E.G., Mil-Spec Contractors, Inc. v. United States, 835 F.2d 865, 867 (Fed. Cir. 1987); S.E.R., Jobs for Progress, Inc. v. United States, 759 F.2d 1, 4 (Fed. Cir. 1985); ATL, Inc. v. United States, 736 F.2d 1343, 1345 (Fed. Cir. 1984); Lehner v. United States, 1 Cl. Ct. 408, 415 (1983); Emeco Ind. v. United States, 485 F.2d 652, 657 (Ct. Cl. 1973); Housing Corp. of Am. v. United States, 468 F.2d 922, 925 (Ct. Cl. 1972).

Additionally, modifying a contract in no way can be considered an integral part of the duty of reviewing contractor compliance. Under no circumstances did Mr. Land have authority to assure Mr. King that he would receive a license at Santa Fe Dam. None of Mr. Land's duties, as described, put him in any position to bind the

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government to a contract, even impliedly Therefore, any statements of modification to th license allegedly made by District Chief o Operations, Robert Land, were withou consequence for defendant. If the Distric Chief of Engineers and the District Chief o Real Estate did, in fact, tell Mr. King to "wor out an arrangement with Mr. King," they acte improperly and beyond the scope of thei authority. It is axiomatic that an agent of th government not possessing contracting office authority cannot be granted that authority expressly or impliedly, by other agents who hav no authority to make the grant.

Finally, plaintiff argued that even if Mr land had no authority, the District Engineer an the District chief of Real Estate ratified th unauthorized acts by not objecting to th proposal of moving plaintiff to the Santa Fe Da

project and by telling plaintiff to "work something out" with Mr. Land. For effective ratification, a superior must have authority to ratify, knowledge of a subordinate's unauthorized act, and then must confirm, adopt, or acquiesce to the unauthorized action of his subordinate. See, United States v. Beebe, 180 U.S. 343, 354 (1901). Where a plaintiff claims the government ratified the act of an agent who acted without authority, "such ratification can only be based upon a full knowledge of all the facts upon which the unauthorized action was taken." Id.

The court finds that plaintiff's ratification argument is weak, at best, based as it is on one vague statement and a failure to object, with no showing that either the District Engineer or the district Chief of Real Estate was sufficiently aware of material facts at the

time to object, or, for that matter, did acquiesce to Mr. Land's purported statement about the move to the Santa Fe Dam. The discussion between Mr. Land and the government about the Santa Fe Dam was nothing more than just that, a discussion. As such, it cannot bind the government.

B. Automatic Renewal of the Hansen Dam License

Plaintiff alleged that before signing the license, defendant through the unidentified officer, assured California Sand and Gravel that the government would renew the Hansen Dam Basin license automatically for at least four years. Defendant responded that even if the assurance had been made, it cannot vary the clear meaning of the integrated agreement. The court cannot find in favor of plaintiff upon the basis of such vague allegations even viewing plaintiff's

position in the most favorable light. Defendant must prevail because of the parol evidence rule. Montana Power, 8 Cl. Ct. at 735. Even had defendant made these alleged assurances after issuing the Hansen Dam license, plaintiff has failed to identify as the speaker any government officer duly appointed with the authority to make such assurances. See, Marks v. United States, 15 Cl. Ct. 609, 614 (1988). These assurances, therefore, are not binding on the government regardless of when made, and this court finds that the Hansen Dam license agreement was not modified verbally to make the license renewable automatically for four additional years, notwithstanding the fact that it was renewed automatically for at least one year. Moreover, even were the assurances valid, defendant, at no time, relinquished its right to terminate the lease under the lease terms.

C. Termination Clause Modifications

The Hansen Dam License contained two separate clauses dealing with the government's right to terminate. Generally, the government could cancel "at the will of the Secretary of the Army." Specifically, Condition 30 permitted defendant to (1) revoke the license for flood control purposes, or (2) terminate the license upon 30-days notice. Plaintiff alleged that it had an agreement with defendant defining the meaning of both clauses. Plaintiff further alleged that this "agreement" arose after the parties executed the license and therefore is not barred by the parol evidence rule.

Mr. King stated that when he asked about the meaning of Condition 30, "various Army Corps officials" explained that it would operate only in the event of a flood or disaster, and that once the flood or disaster subsided, plaintiff

could return to the dam.[9] Mr. King further alleged that these same officials told him the "at the will of the Secretary of the Army" termination clause actually meant the government would cancel the license "at will" only if the government needed the property in times of war. However, plaintiff again has failed to identify any Corps official with contracting authority who made these representations. For that reason, to the extent the responses to plaintiff's inquiries can be classified as agreements or modifications, they must fail.

We know Condition 30 specifies that "the

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[9] The logic of this statement escapes the court. If the licensee was to leave the sediment removal area only for the duration of a flood, it would be senseless to terminate the license for that purpose. In fact, Condition 31 of the license directed the licensee to crease operation during the high-risk flood period each year. The Army logically would not terminate the license only to re-grant it once the flood waters had receded.

license may be revoked or cancelled at any time when required for flood control purposes, [and] [t]he Corps of Engineers shall reserve the right to revoke th s [sic] license on 30 days notice." Plaintiff insists Condition 30 gives the Corps the right to terminate the contract on 30 days notice only when required for flood control purposes. The court does not believe that to be an accurate interpretation of Condition 30. The interpretation of a government contract is a matter of law, not fact, Hol-Gar Mfg. Corp. v. United States, 351 F.2d 972, 974 (Ct. Cl. 1965), and the court is bound to interpret a contract by the plain, reasonable meaning of the language used, Firestone Tire & Rubber Co. v. United States, 444 F.2d 547, 551 (Ct. Cl. 1971), so as to give meaning to all parts of the contract and not render a portion meaningless, Fortec Constructors v. United States, 760 F.2d 1288,

1292 (Fed. Cir. 1985). A court interpreting a contract also must "examine which of several [potentially] competing interpretations is most reasonable and likely under the total circumstances including the business realities of the case." Consumers Ice Co. v. United States, 475 F.2d 1161, 1167 (Ct. Cl. 1973).

Plaintiff would have the court find that under Condition 30, the Corps must give thirty-days notice of termination in the event of flooding. The court cannot agree with plaintiff's argument; it assumes too much. As a matter of law, the court interprets the two sentences of Condition 30 as separate in application. The Corps could revoke the license either (1) when required for flood control purposes, or (2) upon thirty-days notice with no flood control condition precedent. Neither of the two sentences, in all reasonableness, can be

read as a condition to the other. It would be illogical to require the Corps to give a licensee thirty-days notice of a revocation or cancellation of its license for flood control purposes. Time would not permit the Corps to give thirty days to remove a licensee from the Hansen Dam site in the face of a flood. Condition 30 must be read in the disjunctive, i.e., the Corp. could revoke a license with no advance notice in order to control flood waters, or it could revoke a license for other reasons simply upon thirty-days notice. The Corps chose the latter.

III. Termination of the License Agreement

Defendant asserted that Amendment Five was a valid modification of the license agreement, but the court already has found that Amendment

Five was a nullity.[10] It does not follow, however, that the termination was ineffective. Condition 30 of the lease reserved to defendant the right to revoke the lease on thirty-days notice. although the court has no doubt but that the licenses were poorly conceived and administered, that fact cannot deny defendant its rights under the licenses, especially a right as crucial to any government contract as the right to revoke the licenses for reasonable cause. Here, the cause was reasonable; plaintiff and other licensees failed to perform adequately. On that, the record is clear. Had the licensees removed the sediment sufficiently

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[10] The court also notes, based on the evidence presented, that Amendment Five would have been ineffective for lack of consideration. Brennan v. United States, 7 Cl. Ct. 399, 405 (1985). Defendant legally could not have bound plaintiff to an agreement under which it relinquished a remaining lease year while receiving nothing in return.

so as not to not create a flood hazard the government, in all likelihood, would have permitted each, including California Sand & Gravel, Inc., to complete its five-year term.

Admittedly, it is unusual for defendant to terminate a contract without citing a term or condition of the contract, much less the proper term or condition, but that error is not fatal to defendant's case. Whenever the United States casts off its cloak of sovereign immunity to engage in a business-type activity with a business-minded purpose, it must be treated as a private commercial contractor. Standard Oil Co. v. United States, 267 U.S. 76, 79 (1925). Therefore, the court must view defendant's actions as if the government were a private enterprise, with exceptions not pertinent here. A court interpreting a contract also must examine the reasonableness of the business

transaction in order to determine the business realities of the case. Consumers Ice Co. v. United States, 475, F.2d at 1167. The government contracts as does a private person, and its rights and duties are governed by the law applicable to contracts between private individuals. Torncello v. United States, 681 F.2d 756, 762 (Ct. Cl. 1982). Government contracts are given the meaning imputed to a "reasonably intelligent contractor" acquainted with the involved circumstances. Zinger Constr. Co. v. United States, 807 F.2d 979, 981 (Fed. Cir. 1986). Just as a contract is to be interpreted with the standards just stated, so are defendant's actions to be tested. Condition 30 reserved to defendant the right to terminate or revoke (the terms are synonymous here) the license upon thirty-days notice.

Defendant complied substantially, legally,

and within the spirit of Condition 30 in terminating plaintiff's license, even though defendant cited an inapplicable clause as the vehicle for the termination. The termination was as effective as it would have been in the private sector, and equally effective as if no clause were cited. The court must look to the substance of the action, not the phrasing.

CONCLUSION

After a careful review of the facts and the applicable law, the court grants defendant's motion for summary judgment. The court grants defendant's motion to dismiss for lack of jurisdiction against plaintiffs Illinois-California, Recon, and Hansen Basin. Considering all evidence and inferences in favor of California Sand and Gravel, the court finds that the statements made by District Chief of Operations, Robert Land, did not modify the

contract because the court cannot find that he had the requisite authority to obligate defendant. Nor were his actions ratified. Plaintiff's claims for breach of written contract, breach of oral contract, and breach of the implied covenant of good faith and fair dealing are foreclosed. The complaint is dismissed. The Clerk of the court is directed to enter judgment in favor of defendant.

IT IS SO ORDERED

/S/

MOODY R. TIDWELL

Judge

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